University of Miami Law Review

Volume 11
Number 1 *Miami Law Quarterly*

Article 10

10-1-1956

Quarterly Synopsis of Florida Cases

QUARTERLY SYNOPSIS OF FLORIDA CASES*

ADMINISTRATIVE LAW. *Investigation by Florida Bar.* The Florida Bar, upon being alerted to alleged corrupt practices of an attorney, which became the subject of formal charges, was authorized, both by the Integration Rule (31 F.S.A. Integration Rule of Florida Bar, art. XI.) and prior court decisions, to initiate the investigation conducted in this case regardless of whether the conduct complained of was set down in affidavit form.[1]

School Districts. Several school districts in a county were merged into a single school district, retaining the identity of the former districts for purposes of assuring the payment of its bonds. The consolidated district board had the authority to issue refunding bonds on behalf of the old districts.[2]

AGENCY. *Indication of power.* A purchaser brought suit against the vendor for specific performance of a contract for sale of realty, executed in the vendor's name by his duly appointed agent. The Supreme Court held that the duly authorized agent could bind his principal by executing a contract in the name of the principal alone, without any indication of the fact of agency upon the face of the instrument.[3]

ATTORNEYS. *Right of intervention for fees.* Where plaintiffs, without knowledge and consent of defendants' attorney, settled the main action with defendants and secured from them a release of any possible claim for damages for wrongful attachment, it was held that defendants' attorney did not have the right to intervene in the main action (which was in contract) and sue the plaintiff for attorney's fees due for services rendered in procuring dissolution of the writ of attachment.[4]

CONSTITUTIONAL LAW. *Due Process.* Entry of a judgment against a surety without notice under a statute providing for such entry on a forfeited bail bond was not a denial of due process.[5]

*The Florida Supreme Court decided over two hundred cases during the reported period from January 27, 1956, through May 18, 1956. These cases (excluding memorandum opinions and others not of sufficient importance to note) are herein reported. In addition, several federal cases interpretative of Florida law have been included. These opinions are to be found in 85 So.2d 123 through 87 So.2d 497; 229 F.2d through 231 F.2d. (Feb. 1956-Apr. 1956); and 136 F.Supp. through 141 F.Supp. (Jan. 1956-Apr. 1956).

This issue of the Quarterly Synopsis was written by Robert L. Shevin and edited by Patrick McGrotty and Alan Brody.

1. State v. Grant, 85 So.2d 232 (Fla. 1956).
2. State v. Board of Public Instruction, 86 So.2d 652 (Fla. 1956).
3. Treister v. Pacetty, 85 So.2d 605 (Fla. 1956).
4. Warshaw-Seattle, Inc. v. Clark, 85 So.2d 623 (Fla. 1956).
5. Capitol Indemnity Insurance Company v. State, 86 So.2d 156 (Fla. 1956).

Eminent Domain. Where the widening of a highway in front of the premises on which plaintiff had constructed a building resulted in the destruction of the lateral support of the land, and caused the building to settle and crack, the resultant damages were held not to be a "taking," within the constitutional prohibition[6] against the taking of private property without the payment of compensation.[7]

Equal Protection. The constitutionality of a statute providing that, in regard to an employee's recovery against a third party tort-feasor, the compensation carrier shall have a lien for its pro rata share of such recovery on the basis of such equitable distribution of the amount recovered as the court determines, was attacked. It was held that the pro rata share based upon an equitable distribution is available to all compensation carriers, and the statute does not, therefore, deny equal protection.[8]

Justiciable Issue, Dismissed. Where sufficient facts were alleged to make a justiciable issue as to the constitutionality of a statute, it was error to grant a motion to dismiss on the ground that the statute was a valid exercise of police power.[9]

Reapportionment. Where the Legislature passed a statute reapportioning the house of representatives,[10] and this statute was attacked as an abrogation of the constitutional provision requiring reapportionment of both the house and the senate at the same time,[11] the Supreme Court in sustaining the constitutionality of the statute held that it had no power to order legislative action and hence could not conclude that the Legislature had abused its discretion by enacting such a statute without also reapportioning the senate.[12]

Right of Governor to seek re-election. In an election held pursuant to a constitutional provision which contained no express or implied provisions against his running for the succeeding full term,[13] Governor Collins was elected to fill an unexpired term as Governor following the death of the incumbent. Subsequently, it was held that the Governor is eligible to run for election to such full term notwithstanding a provision found elsewhere in the Constitution[14] that a Governor shall not be eligible for reelection to office for the next succeeding term.[15]

CONTRACTS. *Assignee's lien.* The assignee of a conditional sales contract covering an automobile, brought replevin action to recover possession

6. FLA. CONST. Art. XVI, § 29.
7. Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956).
8. Insurance Company of Texas v. Rainey, 86 So.2d 447 (Fla. 1956).
9. Eelbeck Milling Company v. Mayo, 86 So.2d 438 (Fla. 1956).
10. Laws of Fla., c. 31378 (1955).
11. FLA. CONST. Art. VII, § 3.
12. Brewer v. Grey, 86 So.2d 799 (Fla. 1956).
13. FLA. CONST. Art. IV, § 19.
14. FLA. CONST. Art. IV, § 2.
15. Ervin v. Collins, 85 So.2d 852 (Fla. 1956).

of the automobile. The automobile had been returned to the seller unknown to the assignee who had filed papers for certificate of title with a first lien. Subsequently, the automobile was conveyed to the appellant, the ultimate buyer, who claimed to take free and clear of the assignee's lien. The court held that the lien was valid against the appellant and replevin would lie because one cannot claim a better title than he, in fact, receives.[16]

Notice of Defects. Failure on the part of home owners to give written notice of defects, as required by contract, was held to relieve the estate of the deceased contractor from liability for repairs necessitated by defects in the construction of a housing project in the absence of a showing that the contractor was estopped from asserting or had waived such contract requirement.[17]

Parol Evidence Rule. Parol evidence was held inadmissible to supplement a lease agreement that was complete and unambiguous on the ground that the intent expressed in a writing is controlling, and all other utterances are immaterial with respect to the matters embraced.[18]

CORPORATIONS. *Contract.* Where a non-profit corporation transferred its property to another nonprofit corporation which assumed and agreed to pay all the specified and unknown obligations of its predecessor, succeeding corporation took all assets charged with the indebtedness owing for goods sold and delivered to the predecessor corporation and was liable for such indebtedness.[19]

CRIMINAL LAW. *Appeal, proof of insolvency.* Upon a showing that he was the sole support of his wife and seven minor children and that because of a service-connected disability he was unable to do more than odd jobs, an applicant was held to be entitled to adjudication that he was insolvent within the meaning of § 924.17, Florida Statutes 1955, which provides for payment of criminal appeal costs where the appellant is insolvent.[20]

Arrest. Where the appellant was charged with "removing, depositing, or concealing" untaxed liquor [21] and his appeal was predicated on grounds of unlawful arrest it was held since the state beverage supervisor smelled the odor of fermenting mash at defendant's home and defendant admitted that he had a still and 100 barrels, the supervisor had reasonable ground to believe that a felony has been, or was being committed by defendant; consequently, the defendant's arrest without a warrant was lawful.[22]

16. Dicks v. Colonial Finance Corporation, 85 So.2d 874 (Fla. 1956).
17. Eglin Village v. Barnett National Bank, 86 So.2d 271 (Fla. 1956).
18. Ramey v. Koons, 230 F.2d 802 (5th Cir. 1956).
19. Casements, Inc. v. Ruscoe, 85 So.2d 736 (Fla. 1956).
20. Anderson v. State, 85 So.2d 123 (Fla. 1956).
21. See FLA. STAT. § 562.32 (1955).
22. Pegueno v. State, 85 So.2d 600 (Fla. 1956).

Bail. A defendant who was charged with a capital offense was held entitled to bail where the evidence did not clearly show that she was guilty of the degree of homicide with which she was charged.[23]

Consolidated prosecutions. Where a defendant was convicted of murdering two individuals in consolidated prosecutions, the court declared a mistrial as based upon two points of law: First, it was error to order consolidation for trial of two prosecutions for murder where on one indictment the defendant planned to offer only his own testimony, and on the other, he planned to use other testimony, the use of which would result in the forfeiture of his right to conclude the argument on the first charge; and, secondly, if consolidation were proper, it was error to limit the defendant to ten peremptory challenges, because he should have been allowed twenty, the number to which he would have been entitled by statute[24] had he been granted separate trials.[25]

Evidence of prior crimes. While ordinarily, in a criminal prosecution, evidence of other crimes perpetrated by a defendant is not admissible, such testimony was properly allowed for the purpose of indicating defendant's criminal course, even though it tended to prove the commission of an unrelated crime.[26]

Habeas Corpus: Grounds of uncertainty. Where a prisoner had been sentenced to three years imprisonment on each of thirteen separate convictions and it was provided that each sentence subsequent to the first was to expire three years from the date of incarceration, the court, upon a petition for a writ of habeas corpus by the prisoner after his first sentence expired, refused to release him upon the grounds that the sentences were so vague and uncertain as to be of no force and effect.[27]

Habeas Corpus Premature Application. Under the provisions of a statute that where a defendant has been convicted of two or more offenses charged in the same indictment or information, terms of imprisonment shall be served concurrently unless the court expressly directs that they be served consecutively, a petition for a writ of habeas corpus was dismissed as premature where the petitioner had not served either of his two year sentences and there was no showing that the respondent, as prison custodian, would not follow said provisions.[28]

Manslaughter. Testimony which showed that Appellant, with pistol in hand, threatened the deceased and told him to leave, and that subsequently, the deceased grabbed for the gun, and that a struggle ensued in

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23. State v. Kelly, 86 So.2d 166 (Fla. 1956).
24. FLA. STAT. § 913.08 (1955).
25. Meade v. State, 85 So.2d 613 (Fla. 1956).
26. Davis v. State, 87 So.2d 416 (Fla. 1956).
27. Wright v. Mayo, 85 So.2d 230 (Fla. 1956).
28. Hall v. Mayo, 85 So.2d 592 (Fla. 1956).

which the fatal shot was fired, was sufficient to sustain a conviction of manslaughter within the meaning of §782.07 Florida Statutes 1955.[29]

Newly Discovered Evidence. In a prosecution for criminal robbery, where the defendant maintained that a false robbery had been arranged by the complaining witness to cover the disappearance of diamond rings, an affidavit stating that the affiant saw the complaining witness and the alleged robber and that the latter did not have the physical characteristics of the defendant went to the merits of the case and entitled the defendant to a new trial on the grounds of newly discovered evidence.[30]

Pardon. The defendant, convicted of breaking and entering and sentenced to 20 years imprisonment under the habitual offender statute,[31] appealed on the ground that he had been granted an unconditional pardon with respect to the prior conviction. The court in reversing the judgment and sentence ruled that a felony conviction for which the offender has received a full and unconditional pardon cannot be counted as a prior felony conviction under the provisions of the habitual offender law.[32]

Right to conclude. The court cannot deprive the defendant's counsel of the right to deliver the closing argument when defendant has offered no testimony save his own.[33] Defendant's waiver of his opening address does not divest him of this right guaranteed him by statute.[34]

Search and seizure. Where police officers, while arresting the defendant for reckless driving, observed bolita tickets in his automobile and thereupon arrested him for possession of bolita tickets, it was held that the gambling material was admissible in a proceeding for the forfeiture of money allegedly held for conducting a lottery, and that the search of the automobile and defendant's person for the evidence relating to the lottery was reasonable under the circumstances.[35]

Separate counts. Where a defendant was found guilty of two offenses which were simply two facets of one transaction, it was error to sentence him on each count.[36]

DOMESTIC RELATIONS. *Adoption—consent by fraud.* A child custody award made by the county probation officer and the sheriff without the sanction of the county judge is without proper authority,[37] and where evidence showed that the mother's consent to the child's adoption had been

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29. Dolan v. State, 85 So.2d 139 (Fla. 1956).
30. Douth v. Steele, 85 So.2d 550 (Fla. 1956).
31. FLA. STAT. § 775.09 (1955).
32. Fields v. State, 85 So.2d 609 (Fla. 1956).
33. Wright v. State, 87 So.2d 104 (Fla. 1956).
34. FLA. STAT. § 918.09 (1955).
35. State v. Simmons, 85 So.2d 879 (Fla. 1956).
36. Norwood v. State, 86 So.2d 427 (Fla. 1956).
37. FLA. STAT. § 415.04, 415.05 (1955).

obtained by fraud the child was not even a proper subject for adoption proceedings.[38]

Adoption—suitable parents. In a proceeding on the petition of a husband and wife for the adoption of a child whom they had raised for two years since his birth, where the chancellor decreed that due to the petitioner's advanced age and his wife's activities as a Psychic Reader they were not suitable persons to adopt the child, the Supreme Court held this evidence failed to support the determination that adoption of the child by the petitioners would not serve the child's best interests.[39]

Divorce—court's decree as bar. A New York court's decree which granted husband a divorce on the ground of abandonment did not bar the wife's action in Florida for a divorce on other grounds.[40]

Divorce—court's jurisdiction. Where the Circuit Court had granted a divorce and adjudicated the custody of minor children, its jurisdiction continued for the reconsideration of the decree and for making such other order concerning custody as the interests of the minors dictated, even though the Juvenile Court had adjudicated that the children were dependent.[41]

Divorce—lump sum payment of alimony. In lieu of alimony or other claim for property settlement following divorce, a wife was awarded the lump sum of $50,000 to be paid on or before two years from date of decree, and the husband was required to pay divorced wife $125 per week until such $50,000 payment was made. The Court held that the divorced husband should not have been penalized during the period allowed him to arrange his affairs so as to be able to make the lump sum payment, and therefore all weekly payments paid to her as alimony together with interest accrued thereon at 6% per annum would be credited against the lump sum award when it was ultimately paid.[42]

Guardian and ward. The petitioner was lawfully appointed as guardian and did not waive compensation nor breach his fiduciary duty. It was held that he was not a nominee or "dummy" even though he was but a law clerk at the time he was nominated, because he was an officer of the court by virtue of his appointment and therefore was entitled to be paid for his services.[43]

EQUITY. *Contempt of injunctive order.* The court issued an injunction restraining the appellants from engaging in the fumigating business within

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38. *In Re* Adoption of Shea, 86 So.2d 164 (Fla. 1956).
39. *In Re* Brown's Adoption, 85 So.2d 617 (Fla. 1956).
40. Horn v. Horn, 85 So.2d 860 (Fla. 1956).
41. State v. Rogers, 86 So.2d 645 (Fla. 1956).
42. Williams v. Williams, 85 So.2d 225 (Fla. 1956).
43. *In Re* Krecls Guardianship, 85 So.2d 727 (Fla. 1956).

a certain area and appellants clearly violated the injunctive order by advertising as fumigators and submitting bids on fumigating work. It was held that the chancellor was devoid of power to extend the running of the injunction, even as punishment for contempt, since his power to punish for contempt is through compensatory fine.[44]

Nuisance. Where a day nursery was located in a neighborhood where there were traffic signal lights, filling stations, a four-lane highway, and a railroad immediately to the rear, and the nursery was as well supervised as it could be, the operation of the nursery would not be enjoined on the ground that it was a "private nuisance."[45]

EVIDENCE. *Attorney-client privilege.* The attorney-client privilege does not extend to the furnishing of names and addresses of persons who had any knowledge concerning facts pertaining to the accident in ligitation. Thus the plaintiff could not withhold this information on grounds that it was the work product of his attorney.[46]

Cross-examination. In a grand larceny prosecution, cross-examination with reference to periods that the defendant had spent in the guard house was not proper, even though defendant testified he had been convicted by a military court.[47]

Dead Man's Statute. In an ejectment action[48] testimony that decedent had orally conveyed the premises to defendant should have been excluded under the Dead Man's Statute.[49]

Privileged Communications. Where a policy required the insurer to defend the insured through its attorney, communications between insurer and insured for the attorney's use were privileged communications and were not subject to production under a subpoena duces tecum.[50]

Striking of Testimony. The striking of testimony which has a direct bearing upon the credibility of the prosecution's witness and the appellant's defense in general constituted reversible error.[51]

Sufficiency of the Evidence. Questions of sufficiency of evidence will not be considered by the Supreme Court unless it is first presented with all the evidence that was before the trial court.[52]

INSURANCE. *Exclusion Clause.* A passenger hazard exclusion clause contained in a fleet automobile liability policy could not be invoked to defeat liability for negligence in the operation of any of the insured's trucks

44. National Exterminators v. Truly Nolen, Inc., 86 So.2d 816 (Fla. 1956).
45. Beckman v. Marshall, 85 So.2d 552 (Fla. 1956).
46. Dupree v. Better Way, 86 So.2d 425 (Fla. 1956).
47. Mead v. State, 86 So.2d 773 (Fla. 1956).
48. Seeba v. Bowden, 86 So.2d 432 (Fla. 1956).
49. FLA. STAT. § 90.05 (1955).
50. Vann v. State, 85 So.2d 133 (Fla. 1956).
51. Urga v. State, 85 So.2d 629 (Fla. 1956).
52. Nelson v. State, 85 So.2d 832 (Fla. 1956).

other than the one in which the passenger was riding. Therefore the insurer had a duty to defend an action against insured for the death of a hitchhiker riding in one of the insured's trucks which resulted from collision with another of his trucks where the accident was caused by the negligent operation of both.[53]

Policy Agreement. The insured violated a policy agreement not to take out additional insurance and was therefore precluded recovery on his fire policy.[54]

LABOR RELATIONS. *Collective bargaining.* A bus company entered into an agreement with independent contractors concerning janitorial services at the terminal and the union claimed this to be in violation of their collective bargaining agreement with the company. In such a situation it was held that the bus company could get relief against the union.[55]

Reviewability of Award. The court adopted federal law as governing the reviewability of an award made by a board of adjustment in interpreting a collective bargaining agreement negotiated under a duty to bargain imposed on air carriers and their employees. Under federal law, the board's decision was final. Florida law makes unenforceable any agreement to arbitrate future disputes and thus would strike down the provision in the agreement that awards of the board shall be final and binding.[56]

LANDLORD AND TENANT. *Declaratory Judgment.* In an action for damages for the breach of a lease[57] any doubts resulting from disputed questions of fact alone are not sufficient to make available to the litigants the provision of the Declaratory Judgments Act.[58]

MUNICIPAL CORPORATIONS *Authority to Pledge Tax Proceeds.* Under the cigarette tax statute[59] which authorizes cities to spend the tax proceeds for such state functions as are performed by municipal governments and as otherwise performed by state and county governments outside the limits of incorporated municipalities, a city could pledge the proceeds of the tax to secure bonds issued to construct a city hall.[60]

Comprehensive Zoning. Where the city council enacts a comprehensize zoning code it is presumptively valid, and one who assails this code must carry an extraordinary burden in proving its invalidity.[61]

Notice of Action. The plaintiff failed to comply substantially with the Hallandale charter provision requiring, as condition precedent to action

53. Virginia Surety Company v. Russ, 86 So.2d 643 (Fla. 1956).
54. Hunter v. United States Fidelity & Guaranty Co., 86 So.2d 421 (Fla. 1956).
55. Amalgamated Association v. Greyhound Corp., 231 F.2d 585 (5th Cir. 1956).
56. Sigfred v. Pan American World Airways, 230 F.2d 13 (5th Cir. 1956).
57. Barrett v. Pickard, 85 So.2d 630 (Fla. 1956).
58. FLA. STAT. § 87.01 (1955).
59. FLA. STAT. § 210.03 (1955).
60. State of Florida v. City of Auburndale, 85 So.2d 611 (Fla. 1956).
61. City of Miami Beach v. Wiesen, 86 So.2d 442 (Fla. 1956).

against the city for damages arising out of tort, notice to the city commission within 30 days after the injury. A divided court held the defect was not cured by actual knowledge on the part of the city authorities or by their opportunity to investigate irrespective of notice.[62]

Public Policy. A city construction contract granted to an enterprise in which a city commissioner is interested is against public policy, even though the city commission is aware of the relationship and the dealings are honest.[63]

NEGLIGENCE. *Attractive Nuisance Doctrine—Hidden Danger.* A railroad was held not liable under Florida's "attractive nuisance" doctrine for the death of a child who was drowned in their abandoned well which was being used by trespassing children as a swimming hole. The doctrine was not applicable because the approach to the well did not constitute a hidden danger of any kind.[64]

Business Invitee—Duty. A business invitee who fails to apprehend a dangerous condition is not contributorily negligent if there is no reason to suspect the danger.[65]

Duty — Proximate Causation. This is an action for a child's injuries, sustained when he was struck by an automobile on defendant's (a super market) parking lot. The fact that it is to be anticipated that children will accompany their parents to the parking lot is insufficient to show any failure of duty by the defendant which proximately caused or contributed to the cause of the plaintiff's injuries. Defendant's duty is only to use reasonable care in maintaining the premises in a reasonably safe condition.[66]

Guest Statute—Dismounted Passenger. The Guest Statute was applied to an accident which occurred when a passenger, who was being transported by the motorist without compensation on a private road, stepped from the automobile to open a gate and was struck when the automobile rolled forward. Recovery was not allowed because the evidence was insufficient to constitute gross negligence.[67]

Guest Statute—Excessive Speed. A guest passenger's complaint that the collision in which he sustained injuries was due to motorist's negligence in driving, without excuse, at a speed of 70 miles per hour on a clear night over a road which was straight up to the point of collision,[68] sufficiently alleged gross negligence of the motorist as required by the guest statute.[69]

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62. Buck v. City of Hallandale, 85 So.2d 825 (Fla. 1956).
63. Watson v. City of New Smyrna Beach, 85 So.2d 548 (Fla. 1956).
64. Howard v. Atlantic Coast Line Ry. Co., 231 F.2d 592 (5th Cir. 1956).
65. Sagesser v. Sears, Roebuck & Company, 230 F.2d 806 (5th Cir. 1956).
66. Jackson v. Pike, 87 So.2d 410 (Fla. 1956).
67. Fishback v. Yale, 85 So.2d 142 (Fla. 1956).
68. Faircloth v. Hill, 85 So.2d 870 (Fla. 1956).
69. FLA. STAT. § 320.59 (1955).

Last Clear Chance in Railroad Cases. The justification for the doctrine of last clear chance passes with the adoption of a comparative negligence statute;[70] therefore, the doctrine of last clear chance does not apply in cases where the doctrine of comparative negligence is applicable.[71]

Sole Cause—New Trial. The sole proximate cause of an automobile-train collision was the deceased's driving onto the tracks without exercising any safety precautions. This was held to clearly establish the driver's negligence and where the trial judge found the verdict contrary to the weight of the evidence, it was his duty to grant a new trial. Such a decision will not be disturbed on appeal, unless abuse of discretion is clearly shown.[72]

Standard of Care. Regardless of whether a plaintiff who was injured when she stepped on a grating covering a drain in bank's parking lot was a business invitee or a mere licensee, it was nonetheless her duty to see that which would be obvious to her upon the ordinary use of her senses and to exercise a reasonable degree of care for her own safety.[73]

PROCEDURE. *Certiorari—Appellant Court.* The circuit judge's action in transferring a case to the Civil Court of Record for trial, could be reviewed by certiorari. This is an exception to the general rule that the judgment of an intermediate appellate court may not be reviewed by certiorari unless it disposes of the litigation.[74]

Chancellor's Findings. Where the Chancellor had heard all the testimony and had observed all the witnesses his findings were entitled to the highest degree of respect, and the appellate court would regard all factual disputes with great circumspection.[75]

Defendant's Answer—Judging on the Pleadings. Where a court passes upon a defendant's motion for judgment on the pleadings after the defendant has answered, all well pleaded material allegations of the complaint and all fair inferences to be drawn therefrom must be taken as true and the inquiry is whether the plaintiff has stated a cause of action by his complaint. Since the test applied by the court is the same as if defendant had made a motion to dismiss the complaint for "failure to state a cause of action," the allegations of defendant's answer are of no avail to him at a hearing on his own motion for a judgment or decree on the pleadings.[76]

Examination of the Record. Where the record on appeal in an automobile negligence case revealed that points raised on appeal were jury questions and the record did not show that the jury was not advised or had abused its discretion, the points raised were not substantial and the judg-

70. FLA. STAT. § 768.06 (1955).
71. Loftin v. Nolin, 86 So.2d 161 (Fla. 1956). Noted, 10 MIAMI L.Q. 594 (1956).
72. Myers v. Atlantic Coast Line Ry. Co., 86 So.2d 792 (Fla. 1956).
73. Becksted v. Riverside Bank of Miami, 85 So.2d 130 (Fla. 1956).
74. Tantillo v. Miliman, 87 So.2d 413 (Fla. 1956).
75. Larkin v. Tsavaris, 85 So.2d 731 (Fla. 1956).
76. Reinhard v. Bliss, 85 So.2d 131 (Fla. 1956).

ment was affirmed on motion. Inquiry under the Rules of Court contemplates only such an examination of the record as discloses that the judgment appealed from is free from error.[77]

Filing Assignments of Error. In a quiet title suit the defendant's attack on probate court proceedings in the administration of the estate of a decedent, by challenging the legal effect of the administrator's deed conveying lots to the plaintiff, was improper as collateral. It was also held that the defendants failed to perfect the appeal as required by the Supreme Court Rules, in that assignments of error must be filed within ten days after notice of appeal with the clerk of the court whose decree is appealed from.[78]

Final Judgment—Right to Review. The Civil Court of Record awarded a final summary judgment which was reversed on appeal by the Circuit Court and remanded for further proceedings. This judgment had the effect of setting aside the summary judgment and requiring the Civil Court of Record to submit the issues to a jury for determination. Consequently, there was no "final judgment" and nothing for the Supreme Court to review.[79]

Interest on Judgments Against State. A livestock owner who obtained a judgment against the State Livestock Board was entitled to interest on the judgment, even though the payment of interest by the state is not expressly provided for by statute.[80] The statute authorizing six per cent interest on judgments applies to all judgments and makes no exception in favor of the state.[81]

Interlocutory Orders. Orders denying motions for judgment notwithstanding the verdict and for a directed verdict are interlocutory and therefore not appealable in the absence of specific statutory authority.[82]

Limitation of Actions. A complaint in a common law action was filed with the clerk within the two year limitation period but the original process was not placed in the hands of the sheriff until after the limitation period. The court held that the action was barred by virtue of a statute[83] providing that the action is commenced for limitation purposes when process is delivered to the sheriff for service, notwithholding the general procedure rule that an action is commenced when the complaint is filed.[84]

Moot Questions. The court would not decide complex litigation where the appellant insisted that it was moot and when his adversary defended the part attacked and had not challenged by cross assignments the part it considered unfavorable.[85]

77. Cooksey v. Zimmerman, 85 So.2d 593 (Fla. 1956).
78. Goldtrap v. Mancini, 86 So.2d 141 (Fla. 1956).
79. Feiner v. Sun Ray Drug Co. of Fla., 86 So.2d 891 (Fla. 1956).
80. FLA. STAT. § 55.03 (1955).
81. Florida Livestock Board v. Gladden, 86 So.2d 812 (Fla. 1956).
82. Atlantic Coast Line Ry. Co. v. Boone, 85 So.2d 834 (Fla. 1956).
83. FLA. STAT. § 95.01 (1955).
84. Lundstrom v. Lyon, 86 So.2d 771 (Fla. 1956).
85. Bahia Mar Caterers v. City of Fort Lauderdale, 85 So.2d 591 (Fla. 1956).

New Trial—Falsified Testimony. The defendants presented affidavits on a motion for new trial which tended to show that the plaintiff had deliberately falsified testimony as to his earnings. It was held that the new trial should be granted on the grounds of the newly discovered evidence.[86]

Sixty Day Limitation. The trial court in an action against the maker and the endorser of a note first entered a default judgment against the endorser and later entered judgment against the maker. Both the maker and the endorser appealed jointly but the endorser's appeal was not taken within 60 days from entry of judgment against him. It was held that the court did not acquire jurisdiction of the endorser's appeal.[87]

Testimony before Special Master. Where the testimony of witnesses was taken before a special master and an order was entered reducing the special master to the status of a trial examiner, the appellants were not prejudiced because the witnesses whose testimony was favorable to them were not before the Chancellor. The appellants were not deprived of an opportunity to present such witnesses at the trial.[88]

Trial without Jury. The findings of a trial judge, sitting without a jury, are entitled to the weight of a jury verdict. These conclusions will not be disturbed unless clearly unsupported by the evidence.[89]

Unverified Averments. Where notice of appeal in a child support case was not accompanied by a transcript of testimony, the reviewing court could not reverse the chancellor's rulings on unverified averments of the petition.[90]

Voluminous Record. The only point for review was whether the lower court committed error in granting a new trial, yet the Court was confronted with 100 pages of brief, and 500 pages of record and exhibits. This imposes an extra burden on the court and unnecessary expense to the litigant.[91]

REAL PROPERTY. *Bona Fide Purchaser.* Where a purchaser did not record his agreement for purchase of the land but recorded a deed for the land from himself to another and neither he nor his grantee were in possession of the land, a subsequent purchaser was not put on notice of the first purchaser's interest in the land and acquired a good title against the first purchaser.[92]

Broker's Cause of Action. In an action brought by a real estate broker against purchaser on the grounds that they had unjustly enriched themselves at the expense of the broker, by fraudulently representing that the broker was not instrumental in bringing about the transaction, it was held

86. Ogburn v. Murray, 86 So.2d 796 (Fla. 1956).
87. Fellowship Foundation, Inc. v. B. M. Soule, 85 So.2d 628 (Fla. 1956).
88. Stewart v. Mack, 86 So.2d 143 (Fla. 1956).
89. Chakford v. Strum, 87 So.2d 419 (Fla. 1956).
90. Connolly v. Connolly, 86 So.2d 167 (Fla. 1956).
91. Brinson Construction Co. v. Leach, 86 So.2d 889 (Fla. 1956).
92. Poladian v. Johnson, 85 So.2d 140 (Fla. 1956).

that such a complaint does not state a cause of action in equity or at law and petitioners should not have been required to answer.[93]

Enforcement of Use Restrictions. Use restrictions were placed on certain land by a common grantor as part of a general scheme of developing and improving the land owned by him. Such restrictions would be enforced by a court of equity against a grantee who took title with notice of the restrictions, without regard to the technicalities of law relating to convenants running with the land.[94]

Equitable Estoppel. The appellants questioned the validity of the appellee's title to submerged lands, subsequently filled, included in a grant made by the appellants to the appellees where the original deed had vested in the grantees the right to fill such submerged lands, but the grantees were not authorized to fill beyond the boundaries conveyed, and where in good faith they filled beyond that included in the grant. It was held that after years of acquiesence the doctrine of equitable estoppel prevented the appellants from questioning the ownership of the land as enlarged and developed by the grantees.[95]

Grantee's Right to Set Aside Easement. Grantee brings action for rescission and cancellation of an alleged fraudulent agreement between his grantor and the defendant whereby the latter acquired an easement across the property. Whether the complaint was properly dismissed as redress for fraud depends on a showing that the complaining party relied on false representations to his injury, and here the grantee had acquired the property with full knowledge of defendant's easement.[96]

Homstead Exemption. The Supreme Court was called upon to interpret the constitutional provision that homestead exemption shall not extend to improvements or buildings other than to the "residence and business house" of the owner.[97] The court held that this was a flexible clause which should be construed reasonably, depending on the occupation pursued by the owner. Thus, where the husband died seised of an improved parcel of land which, in addition to a family residence, contained a one-story cottage and a two-story garage apartment which were used for rental purposes, the whole parcel constituted the homestead.[98]

Measuring Mesne Profits. The guardian of life tenants was entitled to possession of the realty and mesne profits subject to the life tenancy. The measure of the mesne profits recoverable from the remainderman was the

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93. Borinsgy v. Cohen, 86 So.2d 814 (Fla. 1956).
94. Vetzel v. Brown, 86 So.2d 138 (Fla. 1956).
95. Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775 (Fla. 1956).
96. Maling Corporation v. Ladan Corporation, 85 So.2d 607 (Fla. 1956).
97. FLA. CONST. Art. X, § 1.
98. Union Trust Co. v. Glunt, 85 So.2d 877 (Fla. 1956).

value of the use and occupation of the land during the time the guardian was wrongfully deprived of possession.[99]

Percolating Waters. In an action to enjoin the county from pumping large quantities of water for distribution and sale to the public from wells on a small strip of land adjoining a much larger tract owned by plaintiff, it was held that the complaint stated a cause of action since the owner's right to draw percolating water from his land is restricted by reasonableness.[100]

Private Easements. Appellants seek to enjoin the subdivision and sale of land which had been used for a golf course. The common grantor was not estopped to deny that private easements in the golf course had been created for the benefit of the surrounding property owners.[101]

Restrictive Covenant. In an action by a drive-in theater operator against used-car lot operators to compel them to eliminate from their lots lighting which was objectionable to the operation of the theater and to recover for resulting damages, the evidence was held sufficient to establish that defendants' lighting was such as to be "objectionable" within the meaning of a restrictive covenant of defendants' lease from the parties' common lessor.[102]

Tax Deed Limitations. A deed executed by the trustees of the internal improvement fund pursuant to statute[103] was not subject to the limitations imposed for the recovery of lands in possession of a tax deed holder.[104]

STATE GOVERNMENT. *Appointment of Judges—Jurisdictional Basis.* The Civil and Criminal Court of Record of Pinellas County has broader jurisdiction than the Civil Court of Record of Dade County. Thus it was held that the Judge of the Civil Court of Record of Dade County could not be assigned to try a case in the Civil and Criminal Court of Record of Pinellas County, but the Governor could, however, designate a Circuit Court judge to hear the cause.[105]

Appointment of Judges—Unexpired Term. The resignation of the Judge of the Court of Crimes of Dade County, who was appointed by the Governor for a four year term, did not create a vacancy to be filled at the 1956 election; hence, the Governor properly appointed a successor for the unexpired portion of the term.[106]

Circuit Court Judge's Power to Disqualify. The appellant brought suit for determination that a particular judge was disqualified from hearing any

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99. Kany v. Becks, 85 So.2d 843 (Fla. 1956).
100. Koch v. Wick, 87 So.2d 47 (Fla. 1956).
101. Burnham v. Davis Islands, Inc., 87 So.2d 97 (Fla. 1956).
102. Grentner v. LeJeune Auto Theater, 85 So.2d 238 (Fla. 1956).
103. FLA. STAT. § 192.38 (1955).
104. Newmons v. Lake Worth Drainage District, 87 So.2d 49 (Fla. 1956).
105. *In re* Advisory Opinion to the Governor, 86 So.2d 158 (Fla. 1956).
106. Klein v. Schulz, 87 So.2d 406 (Fla. 1956).

cases where he was involved as attorney, on grounds of the judge's prejudice against him. The action was dismissed and subsequently affirmed. A Circuit Court judge has no power to determine that another judge is disqualified by prejudice from hearing a case, and the Supreme Court can not order the Circuit Court judge to do so. The attorney's remedy is under the statute providing for the disqualification of judges.[107]

Disqualification Proceedings. Where the Governor individually was a litigant, a question arose as to possible bias on the part of three Justices of the Supreme Court in favor of the Governor, based on facts that one justice's family and the governor's family were close, intimate and personal friends and two other justices were appointed to office by the governor and were personal and political friends of the governor. It was held that these facts were not sufficient to constitute a legal basis for disqualification.[108]

STATUTORY CONSTRUCTION. *Advertisement Restrictions—Alcoholic Beverage Retailers.* The "tied house evil" statute prohibits a manufacturer or distributor from furnishing to licensed retailers of alcoholic beverages, any outside sign, etc., so as to remove the retailer from financial or business obligations to the manufacturer or distributor. Such section does not prohibit, per se, the location on the retailer's premises of an outside sign advertising alcoholic beverages where the lease from the retailer to the advertising company has been entered into in good faith.[109]

Constitutionality—Qualifying Date. A Section of a General Law which fails to operate uniformly throughout the state is unconstitutional and invalid unless it contains a classification predicted on a reasonable basis. Sec. 3 of Ch. 29936 was held unconstitutional because it unreasonably excluded several large counties from the provisions of the Act setting the definite qualifying date for elective offices. It was further held that it is not necessary to declare the entire Act invalid even though the Act contains *no* severability clause.[110]

Foreign Courts Decisions—Similar Statute. The decisions of courts of a foreign state were especially applicable where a city ordinance, alleged to have been violated, was apparently copied from a penal statute of the foreign state.[111]

Special Improvements without Consent. An act authorizing county boards of public instruction to discharge encumbrances on school properties for special or local assessments for streets and sidewalk improvements does not require the boards to use these funds to pay for special improvements without the board's consent or approval.[112]

107. Ginsberg v. Holt, 86 So.2d 650 (Fla. 1956).
108. Ervin v. Collins, 85 So.2d 833 (Fla. 1956).
109. Hunter v. McKnight, 86 So.2d 434 (Fla. 1956).
110. State v. Newell, 85 So.2d 124 (Fla. 1956).
111. Maclow Corp. v. City of Miami Beach, 85 So.2d 860 (Fla. 1956).
112. Board of Public Instruction v. City of Jacksonville, 86 So.2d 887 (Fla. 1956).

Qualifications for Pharmacy Examination. In an action to construe rights under a statute[113] setting forth qualifications of applicants for examination by the Board of Pharmacy, petitioner claimed that due to the fact that a period was placed at the end of the contents of subparagraph (b), the subparagraphs (b, c, d) were alternative and not cumulative. The court, in carrying out legislative intent, held that the subparagraphs were cumulative, thus making it necessary for applicant to have *both* a pharmacy degree from a qualified school and the required hours of experience.[114]

TAXATION. *Charitable Purpose Exemption—Summary Judgment.* The plaintiff seeks to enjoin the assessment and collection of taxes upon its property on the theory that the property was being used exclusively for charitable purposes and the defendants presented a deposition and affidavit to dispute this contention. It was held that this material did not provide sufficient information as to the property's use to sustain the chancellor's findings against the plaintiff's right of injunction; hence, there were genuine issues of material fact to be tried.[115]

Payment of Delinquent Taxes—Reacquired Land. The plaintiff paid delinquent taxes in 1941 and bought back his parcel of land previously lost to the state for nonpayment of taxes. He was therefore entitled in an action in ejectment to contest the sufficiency of the defense of adverse possession raised by the defendants who occupied this land adversely, without color of title, from 1941 to 1945.[116]

Sales Tax Exemptions—"Dealers." The appellant operated an iron works and furnished and installed materials for the improvement of real property on a cost plus basis. The court held he was a "dealer" within the comptroller's rule eliminating from exemption from sales taxes contracts by which the contractor acts as a "dealer" selling tangible personalty. The appellant was therefore subject to a sales tax.[117]

Tax Lien—Strength of Title. Under the statutes in force at the time the county obtained its quiet title decree and the drainage district obtained its foreclosure decree, the county converted its tax lien into a title which was taken in recognition of the outstanding delinquent drainage district liens, but which was not subject to enforcement of the liens in an action against the county itself. Thus, the enforcement of the drainage district liens was placed in a state of suspension until the county disposed of the title, whereupon the drainage district could then enforce its liens against the purchaser. However, the purchaser from the drainage district would

113. FLA. STAT. § 465.071 (1955).
114. Baker v. Morrison, 86 So.2d 805 (Fla. 1956).
115. Fellowship Foundation v. Paul, 86 So.2d 808 (Fla. 1956).
116. Gates v. Roberts, 85 So.2d 862 (Fla. 1956).
117. Harvey v. Green, 85 So.2d 829 (Fla. 1956).

not be entitled to prevail in ejectment against the purchaser from the county.[118]

WILLS AND TRUSTS. *Bank Deposit Trust—Presumption on Death of Depositor.* Where a depositor made a bank deposit in her own name in trust for her son and took no steps during her lifetime to revoke the Totten trust,[119] the presumption arose that an absolute trust was created as to the balance on hand at the death of the depositor. Thus the son, and not the administrator, was entitled to the proceeds of the deposit upon his mother's death.[120]

Cancellation of Instrument—Mistake in Inducement. An action was brought by beneficiaries under the original will to set aside an amended will on the grounds that the decedent was induced by mistake of fact to execute the second instrument. It was held that the statute[121] granting relief when wills are secured by fraud, duress, mistake or undue influence does *not* relate to mistakes in inducement.[122]

Killing Decedent—Bar to Inheritance. The statute[123] declaring that any person convicted of the murder of a decedent shall not be entitled to inherit from the decedent was not applicable as a bar where the widow was acquitted, on grounds of insanity, of murdering her husband. It was further held that if the statute was not applicable to dower rights the common law did not provide for the forfeiture of the wife's dower rights, whether the killing was lawful or unlawful.[124]

WORKMENS COMPENSATION. *Carrier's Rights to Adjudicate Degree of Disability.* Where the compensation carrier had completed payment to claimant of compensation for 10% permanent partial disability of her hand and had filed with the commission a final settlement report with respect to the claim, and no claim for further compensation had been filed, the carrier would not be entitled to a hearing to obtain an adjudication as to the degree of the claimant's permanent partial disability.[125]

Carrier's Right of Set-off. A Workmen's Compensation insurance carrier was not entitled to set-off the amount of compensation paid under an award for permanent partial disability against the amount of temporary total disability compensation awarded the employee because the decrease in disability occurred after the period for which permanent disability compensation was awarded. An overpayment arises only when an award de-

118. Kostecos v. Johnson, 85 So.2d 594 (Fla. 1956).
119. *In re* Totten, 179 N.Y. 112, 71 N.E.748 (1904).
120. Seymour v. Seymour, 85 So.2d 726 (Fla. 1956).
121. FLA. STAT. § 731.08 (1955).
122. Forsythe v. Spielberger, 86 So.2d 427 (Fla. 1956).
123. FLA. STAT. § 731.31 (1955).
124. Hill v. Morris, 85 So.2d 847 (Fla. 1956).
125. Miami Beach First National Bank v. Dunn, 85 So.2d 556 (Fla. 1956).

creasing the compensation rate is made effective from the date of the injury.[126]

Carrier's Obligation to Pay Attorney's Fees. In a proceeding to review an order of the Industrial Commission awarding fees to the claimant's attorneys for representing the claimants before the commission, where the insurance carrier admitted the claim liability but contended that the investigation and determination of the lawful beneficiary was the commission's function and that the burden of attorney's fees should not be placed upon the carrier, it was held that the successful claimants were entitled to an award of attorney's fees, where the carrier had failed to comply with the requirements of the act so as to avoid its obligation to pay the claim.[127]

Course of Employment. The claimant, who was leaving the lobby of a hotel during his attendance at a convention, sustained a cerebral vascular accident from an alleged fall. It was held that he was engaged in the pursuit of his own private affairs and his injury was not sustained in the "course of the employment."[128]

Insurer's Liability. When the employer's insurance carrier insures the payment of benefits by the employer, the carrier must pay whatever judgments are lawfully rendered against the employer.[129]

Statute of Limitations—Minors not Bound. A claim of minors for compensation for the death of their father, though not filed until more than two years after the death of the father, was not barred by the two-year limitation. The minors could not be bound by the failure of their mother to pursue a remedy made available by law for the benefit of the minors.[130]

Timely Filing—Application for Review. An application for review of the Deputy Commissioner's order awarding compensation was filed with the full Industrial Commission at Tallahassee 21 days after the entry of the order instead of within the 20 days allowed by the Act.[131] The application was not timely, even though it was filed with the Deputy Commissioner within the 20-day period.[132]

Total Disability—Blindness. The employee had lost one eye in the service of another employer and subsequently lost the remaining eye in the service of the instant employer. The court held that he sustained total blindness in the service of the instant employer which constituted total disability compensable for 700 weeks rather than for 175 weeks for loss of one eye.[133]

126. Smitty's Coffee Shop v. Florida Industrial Commission, 86 So.2d 268 (Fla. 1956).
127. Great American Indemnity Company v. Williams, 85 So.2d 619 (Fla. 1956).
128. Foxworth v. Florida Industrial Commission, 86 So.2d 147 (Fla. 1956).
129. Lyng v. Rao, 87 So.2d 108 (Fla. 1956).
130. Bailey's Auto Service v. Mitchell, 85 So.2d 228 (Fla. 1956).
131. FLA. STAT. § 440.25 (4) (a) (1955).
132. Fournigault v. Jackson Memorial Hospital, 87 So.2d 102 (Fla. 1956).
133. Alexander v. Peoples Ice Co., 85 So.2d 846 (Fla. 1956).